

No. 77-980

Supreme Court, U. S.  
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**In the Supreme Court of the United States**

OCTOBER TERM, 1977

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**ALBERT A. LEWIS, ETC., APPELLANT**

**v.**

**JAMES L. COWEN, ET AL.**

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**ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE EASTERN  
DISTRICT OF PENNSYLVANIA**

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**MOTION TO AFFIRM**

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**WADE H. MCCREE, JR.,  
Solicitor General,  
Department of Justice,  
Washington, D.C. 20530.**

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The Solicitor General, on behalf of appellees,<sup>1</sup> moves that the judgment of the district court be affirmed.

1. Appellant is a former railroad employee who retired in 1964 at the age of 64. Since his retirement, he has received benefits from the Railroad Retirement Board, which makes old age insurance payments to retired railroad employees. Because appellant retired before his 65th birthday, his benefits were reduced slightly under the Railroad Retirement Act of 1937, as amended by 60 Stat. 727, 45 U.S.C. (1970 ed.) 228b(a), which required a reduction of 1/180 in the payments for each month before his 65th birthday that a man retires. No employee covered by the statute could retire before age 60, but the benefits of women who retired between age 60 and age 65 were not reduced.

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<sup>1</sup>The Railroad Retirement Board and its members are the appellees.

In 1973 Congress eliminated the disparate reduction of benefits for men who retire between 60 and 65; consequently, persons such as appellant who have retired since 1974 or who will retire in the future receive the same benefits as women do.<sup>2</sup> Appellant, however, continues to receive reduced benefits, because he retired before 1974. He contends that the reduction of his benefits violates both the equal protection component of the Due Process Clause ~~on~~ Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e *et seq.*

2. The judge to whom the case was referred declined to convene a three-judge district court and held that appellant had not raised a substantial constitutional question. The court granted summary judgment against appellant (J.S. App. 1A-7A). On motion for reconsideration, the district court wrote a thorough opinion explaining and adhering to its position (417 F. Supp. 1047; J.S. App. 8A-53A). The court of appeals vacated that decision, holding that a three-judge district court should have been convened because appellant's claim was not wholly insubstantial or essentially fictitious (547 F. 2d 1162; J.S. App. 54A-59A).

Before the three-judge court considered the case, however, this Court decided *Califano v. Webster*, 430 U.S. 313, which rejected a constitutional challenge to a provision of the Social Security Act that gave women who retired before age 65 slightly greater retirement benefits than it gave similarly-situated men. Relying on *Webster*, the three-judge district court granted summary judgment against appellant (J.S. App. 60A-78A). The district court also rejected appellant's claim that the Railroad Retirement Act had been repealed by implication by Title VII.

<sup>2</sup>See 88 Stat. 1312, 45 U.S.C. (Supp. V) 231a(a).

3. The constitutional issue presented is whether the distinction between men and women in this case violates the equal protection guarantee of the Due Process Clause of the Fifth Amendment. That issue is squarely controlled by *Webster*. *Webster* held that a provision giving women greater Social Security benefits than men was constitutional because it served the important objective of compensating women for past discrimination against them. 430 U.S. at 317-320.

As the district court held here, the analysis of *Webster* requires rejection of appellant's constitutional claim.

The statute at issue here was enacted in 1946, and the district court found that the legislative history provides "a substantial basis for recognizing the remedial purposes" of the statute (J.S. App. 64A). The court relied on testimony of Murray W. Latimer, then Chairman of the Railroad Retirement Board, which demonstrated that "a greater proportion of women were unable to continue working past age sixty than men who could continue working past age sixty-five" (*id.* at 65A); the court found that "Congress' purpose in enacting §228b was to decrease disparity between the economic capabilities of a man and a woman employed in the railroad industry" (*id.* at 66A; internal quotation marks omitted). See *Webster, supra*, 430 U.S. at 317 ("[T]he only discernible purpose of §215's more favorable treatment is the permissible one of redressing our society's longstanding disparate treatment of women" (brackets omitted)).

The district court also was influenced by the evidence of discrimination against women at the time Congress enacted Section 228b (J.S. App. 66A):

During the year when Chairman Latimer testified, the data indicated that women were less than two tenths of one percent of the executives, officials and



staff assistants, less than three percent of the professional assistants, and approximately two percent of the supervisors or clerks, even though they constituted approximately eight percent of the total work force.

The district court observed (*id.* at 67A) that: "Even if we were not willing to recognize the existence of discrimination in the railroad industry at the time §228b was enacted, the Congressional purpose of reducing economic disparity is, itself, an acceptable 'important governmental objective.'" It concluded that, "[i]n recognition of the *diminished economic capabilities of women in the railroad industry* after age sixty, a statute enabling women to retire from the industry after age sixty with full benefits is 'substantially related' to the remedial purposes of the provision" (*id.* at 70A; emphasis in original).

The district court's opinion is thorough and careful, taking guidance at each step from *Webster* and its predecessors. The decision should be affirmed without plenary review. The Railroad Retirement benefit program is a social insurance scheme very much like Social Security. See J.S. App. 62A-63A. Like the Social Security provisions upheld in *Webster*, the Railroad Retirement Act provides slightly more favorable treatment to women who retire after 60 but before 65. In *Webster* women were allowed to disregard more low-earnings years than men, and here women may retire without the reduction in benefits that men incur. Here, as in *Webster* (430 U.S. at 318):

The challenged statute operated directly to compensate women for past economic discrimination. Retirement benefits under the Act are based on past earnings. But as we have recognized: "Whether from overt discrimination or from the socialization process

of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paying jobs." *Kahn v. Shevin*, 416 U.S. at 353.

Appellant does not attempt to distinguish *Webster*. He contends only that men "continue to suffer, solely because of their sex, a reduction in pension payments" (J.S. 13). Under the circumstances of this case and the principles of *Webster*, however, the disparate treatment is not unlawful.<sup>3</sup>

4. Appellant also contends (J.S. 13-14) that Title VII of the Civil Rights Act of 1964 implicitly repealed the gender distinction of the Railroad Retirement Act. Even assuming *arguendo* that Title VII would prevail if there were a conflict between the statutes, there is no conflict, for Title VII applies only to the practices of an employer, 42 U.S.C. 2000e-2(a). 42 U.S.C. (Supp. V) 2000e-16. The Railroad Retirement Act is a social insurance plan administered by the government. The government does not act as an "employer," nor do the former employers of the railroad workers administer the benefit system.<sup>4</sup>

Moreover, as we have shown, Congress enacted the special treatment of women in this case because of its

<sup>3</sup>The statistical evidence presented at J.S. 7-12 was properly discounted by the district court as "largely unrelated to the relevant economic conditions present and capable of being analyzed by Congress at the time §228b(a) was enacted" (J.S. App. 68A). Similar considerations concerning changing employment patterns may have influenced Congress' decision to repeal the statute, but the repeal does not indicate that the statute was unconstitutional, and present economic conditions cannot retroactively invalidate an Act of Congress. See *Webster*, *supra*, 430 U.S. at 320-321.

<sup>4</sup>The question whether an "employer" that contracted with an insurance company to provide retired employees with disparate benefits of the sort at issue here would violate Title VII is not presented by this case, because appellant's employer had no choice but to participate in the program adopted by Congress.

desire to compensate women for past economic disadvantages. This narrowly drafted remedy for past discrimination should not give way simply because Congress later added another more general remedy. Finally, Congress itself has amended the Railroad Retirement Act to eliminate the gender distinction, a step indicating Congress' belief that Title VII did not affect the Railroad Retirement Act.

It is therefore respectfully submitted that the judgment of the district court should be affirmed.

WADE H. MCCREE, JR.,  
*Solicitor General.*

MARCH 1978.